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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALBANY INSURANCE COMPANY,
Petitioner

Versus

ANH THI KIEU,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF HIGHLANDS INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF CONSENT OF ALL PARTIES

Highlands Insurance Company certifies that all counsel of record have stated in writing that they consent to Highlands' submission of a Brief Amicus Curiae in support of Albany Insurance Company's Petition for Writ of Certiorari. Copies of the written consent have been filed with the Clerk.

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BRIEF AMICUS CURIAE OF HIGHLANDS INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

Highlands Insurance Company (hereafter Highlands) was incorporated in Texas in 1975, and is licensed to engage in the insurance business in all of the United States. Highlands has been underwriting marine insurance risks for fishing vessels and other craft since 1968, and has written many thousands of hull insurance policies as well as other forms of marine insurance. Vessels in-

sured by Highlands operate along and offshore all three United States coasts, in Alaska, Hawaii, and Puerto Rico. Highlands intends to continue its participation in the business of writing marine insurance policies.

Highlands has received claims and on occasion has participated in claims-related litigation in almost every coastal state. Because it is unable to predict where vessels it insures may have casualties, and therefore where claims and litigation may arise, Highlands depends upon and is vitally interested in the uniform application of marine insurance law throughout the United States so that it may proceed with the tasks of underwriting and claims evaluation in the most rational, consistent and economic fashion.

Prior opinions of this Court, the Fifth, First, Second, and Eleventh Circuit Courts of Appeal, have led Highlands and other members of the insurance industry to underwrite their policies relying on the doctrine of *uberrimae fidei* as a specific and controlling rule of federal marine insurance law which, until now, has been accorded a consistent and uniform application throughout the United States. But the Fifth Circuit's decision below, *Albany Insurance v. Anh Thi Kieu,* 927 F.2d 882 (5th Cir. 1991), brings unheaval and conflict to this settled area of maritime law. This presages turmoil in marine insurance underwriting practices, with resultant and unnecessary difficulties for those attempting to purchase marine insurance.

As a substantial member of the marine insurance industry in the United States, and therefore being directly affected by the opinion of the Fifth Circuit, Highlands submits its Brief *Amicus Curiae* in support of the Pe-

tition for Writ of Certiorari in the hope that it will assist the Court in considering in detail the need to repair the damage to the maritime law and marine insurance interests, insureds as well as insurers, caused by the Fifth Circuit's decision.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted:

1) To resolve a conflict among the Circuits and to enunciate unequivocally the continuing vitality of the federal courts' previous declarations of *uberrimae fidei* as a principle of maritime law.

The decision below not only rejects the Fifth Circuit's own previous and long-standing acknowledgement and reliance upon the principle of *uberrimae fidei* in *Fireman's Fund Ins. Co. v. Willburn Boat Co.*, 300 F.2d 631, 647 n. 12 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962), and *Gulfstream Cargo Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 981 n. 20 (5th Cir. 1969), but creates a conflict with the law of the First, Eleventh and the Second Circuits in directly analogous fact situations on this significant principle pertaining to the interpretation of marine insurance contracts. *See, Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), *vacated in part, adhered to in relevant part*, 779 F.2d 1485 (11th Cir. 1986); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Puritan Ins. Co. v. Eagle S.S. Co., S.A.*, 779 F.2d 866 (2d Cir. 1985); *A/S Ivarans Rederei v. Puerto Rico Ports Authority*, 617 F.2d 903 (1st Cir. 1980).

2) To preserve and further encourage uniformity in the interpretation and application of marine law and prevent cases with identical facts having diametrically opposed outcomes in the various judicial circuits.

Heretofore the *uberrimae fidei* doctrine has been uniformly incorporated in the maritime law of the several circuits. The Fifth Circuit's decision below represents an abandonment of that principle and of the goal of uniformity in the application of maritime law throughout the United States. The decision below relegates the interpretation and application of each marine insurance policy to the vagaries of the law of the state where the marine casualty occurred or the policy written, ensuring completely contradictory outcomes in cases involving the identical or similar issues.

3) To eliminate the encouragement of fraud by marine insureds and the disruptive and deleterious effect on the marine insurance industry which will result from the decision below.

The Fifth Circuit's radical departure from this doctrine precipitates a great discontinuity into the marine insurance law and sets the stage for an upsurge of fraud on the part of marine insureds. The net result will be less efficiency in the marine insurance market, more expensive insurance, and fewer marine insurers. None of these ends works to the advantage of maritime commerce in this nation.

ARGUMENT

I.

THE FIFTH CIRCUIT'S DECISION BELOW CREATES A WHOLLY UNTENABLE CONFLICT WITH THE LAW OF THE FIRST, SECOND AND ELEVENTH CIRCUITS AS TO A CORE PRINCIPLE OF MARITIME LAW AND IN THE RESULTS OF THE APPLICATION OF THAT PRINCIPLE TO SIMILAR FACT SITUATIONS.

The opinion below creates a head-on conflict in maritime law between the Fifth Circuit and the Circuit Courts of Appeal for the First, Second, and Eleventh Circuits, not only as to the preeminence of *uberrimae fidei* as a principle of marine insurance, but in the application of that principle to similar but undistinguishable fact patterns.

In the case at bar, Anh Thi Kieu applied for $90,000 in marine insurance on her shrimp boat, falsely alleging, *inter alia,* that she had purchased the vessel for $110-000, when in fact she had paid only $30,000 for the vessel. Labeling the Fifth Circuit's prior enunciations of the preemptive force of the doctrine of *uberrimae fidei* as "mere dicta," the court below allowed Anh Thi Kieu to recover the $90,000 face value of the policy, less the $15,000 salvage value of the vessel. This resulted in a recovery of 250% of the cost of the vessel actually paid by Anh Thi Keiu. Such inflated recoveries by assureds provide a strong motive for fraud and deception. For this reason, virtually every insurer in all 50 states, if not worldwide, refuses to write insurance for more than the amount the prospective assured paid, at least with-

out being furnished information by the assured which supports the higher value of the vessel being insured.

The Second and Eleventh Circuits, have unequivocally recognized the doctrine of *uberrimae fidei* as an established and clear rule of maritime law:

1. In *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987), the Second Circuit applied the doctrine of *uberrimae fidei* to affirm summary judgment for the defendant insurer, voiding *ab initio* a $30 million marine insurance policy on antique statues which were lost at sea. It did so because the assured failed to disclose the very material fact of a prior underwriter's cancellation of a $30 million policy because it believed the statues were overvalued, and because this fact would have controlled the underwriter's decision not only on whether to accept the risk at all, but as to the amount of coverage it would provide. 804 F.2d at 14. The court emphasized that the issue of whether the prior cancellation was justified and whether the statues were in fact overvalued and inauthentic was not material, only the fact that the prior policy had been cancelled. *Uberrimae fidei* required the assured to disclose this fact so that the new insurer could decide for itself whether to accept the risk and what amount of coverage to offer. The decision of the court below in this case would require the payment of the $30 million to the insured, a handsome reward to the insured for concealing a very material fact which misled and deceived the insurer.

2. In *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), *vacated in part, adhered to in relevant part*, 779 F.2d 1485 (11th Cir.

1986), the Eleventh Circuit, stating that the maritime rule requiring full disclosure by a prospective insurer is the controlling rule even in the face of contrary state law, held that knowledge of unseaworthiness by the assured, not communicated to the insurer, would void a hull insurance policy. 747 F.2d at 695. The decision of the court below would have permitted the assured to recover in full despite its concealment of the unseaworthiness of its vessels.

3. While not expressly referring to the doctrine of *uberrimae fidei,* the First Circuit voided a marine liability reinsurance policy based on the assured's failure to meet the "high standard of disclosure of material facts applicable in marine insurance dealings," citing *Fireman's Fund Ins. Co. v. Wilburn Boat Co.; A/S Ivarans Rederei v. Puerto Rico Ports Authority,* 617 F.2d 903, 905 (1st Cir. 1980). In *A/S Ivarans Rederei,* the First Circuit denied recovery to the assured where the assured's primary insurer had not disclosed to the reinsurer prior incidents arising from defective dock conditions of which the assured had full knowledge and which had not been remedied. The court held the reinsurance policy void even though the assured port authority *had* disclosed these facts to the insolvent primary insurer. The decision below would permit the dock owner assured to recover, despite its concealment of the defects and its complete failure to correct them.

As the foregoing demonstrates, the late-in-the-day rejection by the Fifth Circuit of *uberrimae fidei* as a preeminent and fundamental rule of maritime law results in diametrically opposed outcomes in the various circuits in directly analogous fact situations. It is abundantly clear that if the case below had arisen in the First,

Second or the Eleventh Circuit, Anh Thi Kieu's blatant and admitted misrepresentations would have resulted in her marine hull policy being voided. At least up to 1969, Anh Thi Kieu would have lost even in the Fifth Circuit itself on these same facts. *See Gulfstream Cargo, supra.* At this time, only in the Fifth Circuit would Anh Thi Kieu's uncontroverted misrepresentations have been *rewarded* by a 250% profit on her investment. This Court should not permit such an unsound policy which allows the rewarding of the devious and deceitful to stand.

This disruption of uniformity among the circuits is made all the more difficult, and the need to quiet this newly-created disharmony in the maritime law of the United States is made all the more compelling, when one recalls that it was largely the Fifth Circuit Court of Appeals that was responsible for national acceptance of the notion that marine insurance contracts must be interpreted in light of the principle that both parties to the contract are held to the standard of utmost good faith and full disclosure. It was its offspring, however, the Eleventh Circuit Court of Appeals which stated it most concisely:

> "The general rule of maritime insurance requiring full disclosure, is well settled in this circuit, and as a clear rule of maritime law it is the controlling federal rule even in the face of contrary state authority."

Steelmet, Inc. v. Caribe Towing Corp., supra at 695. Likewise, the trial courts in circuits where the *uberrimae fidei* question in its present incarnation has not yet been considered by the circuit court of appeals

have generally followed the leadership of the Fifth Circuit in concluding that the *uberrimae fidei* doctrine is entrenched federal maritime law. E.g., *Port Lynch, Inc. v. New England Int'l Assurety of America, Inc.*, 754 F. Supp. 816 (W.D. Wash. 1991).

The Writ of Certiorari should be granted to resolve this untenable conflict.

II.

THE FIFTH CIRCUIT'S DECISION BELOW PRECLUDES AND UNDERMINES THIS COURT'S ENUCIATED GOAL OF UNIFORMITY IN MARITIME LAW.

Uberrimae fidei is a bedrock principle of maritime law, heretofore receiving uniform application nationwide. This Court has repeatedly taught that uniformity in the administration of maritime law by courts of the United States is a vital goal. *Miles v. Apex Marine Corp.*, ____ U.S.____, 111 S. Ct. 317, 323, 112 L.Ed.2d 275 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986). Opinions of the Fifth Circuit in the past have reflected a particular sensitivity to the multi-jurisditional problems inherent in maritime commerce, which cause uniform application of maritime law throughout the United States to be such a salutory goal. *J. Ray McDermott & Co. v. M/V MORNING STAR*, 457 F.2d 815, 818 (5th Cir. 1972) (*en banc*), *cert. denied*, 409 U.S. 948 (1972) (referencing the harmony maritime law brings to international and interstate relations). *See also, Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317-18 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988) (uniformity doctrine "is of greatest importance where legal relations are not predictably related

to a certain locale and its laws"). The Fifth Circuit has previously described the *uberrimae fidei* doctrine as "direct and clear," *Gulfstream Cargo Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 981 n. 20 (5th Cir. 1969), and "solidly entrenched," *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 647 n. 12 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962). Yet the same court in its opinion below, while "recognizing" that this Court applies the *uberrimae fidei* doctrine, nevertheless dismissed all of the foregoing as "mere dicta," so that Texas law could be applied, even though the law of Texas on point is the direct opposite of maritime law. The abandonment of the doctrine of *uberrimae fidei* by the Fifth Circuit precludes uniformity in the area of marine insurance and guarantees totally dissimilar and conflicting results in cases arising within the Fifth Circuit itself and among cases arising in other circuits, even though the insurance policies, terms, and conditions are identical. The resulting unpredictability can result only in chaos, unfairness and unequal treatment under the law for both insurers and insureds.

III.

REJECTION OF THE ESTABLISHED PRINCIPLE OF *UBERRIMAE FIDEI* BY EVEN ONE CIRCUIT WILL CREATE A HOSPITABLE CLIMATE FOR FRAUD AND HAVE A MOST DELETERIOUS EFFECT ON BOTH MARINE INSURERS AND THEIR INSUREDS.

The Fifth Circuit's rejection of the *uberrimae fidei* doctrine as entrenched maritime law creates a legal climate in which marine insurance, a necessary element of this nation's maritime commerce, will be converted

from a rational business activity based on the concepts of good faith, rational evaluation of risk, and fair dealing into a floating poker game, with the ultimate loss to be determined by the state in which the casualty may occur. For example, in the present matter the assured misstated vital information concerning the value of her vessel and its operations, information obviously germane to her hull insurance underwriter. Yet when her statements were discovered to be false, the underwriter was still bound to pay off handsomely on the insured's gamble because Texas law, unlike the *uberrimae fidei* doctrine in maritime law, requires the insurer to prove that the insured's misrepresentations of fact were made with a specific intent to deceive the insurer, and Texas insurance law was construed to require that the insured's misrepresentations be causally connected to the destruction of her vessel, whereas maritime law imposes no such burden. *Albany Insurance v. Anh Thi Kieu,* 927 F.2d 882, 891 (5th Cir. 1991).

Aside from the principle of uniformity in the administration of maritime law discussed above, the situation created by the Fifth Circuit's opinion is intolerable because it will create a climate in which the Fifth Circuit will serve as a magnet for vessel owners wishing to procure marine insurance by fraudulent means. The net result is that vessel owners here will be given an inducement to falsify and misrepresent as much as they can in order to induce hull underwriters to insure at lower rates risks which they might otherwise flatly reject. Highlands can think of no reason why this will not occur, because the fraudulent vessel owner has nothing to lose. Caught in his misrepresentation before the placement of insurance, the applicant is in no worse position

than when he started. But if he succeeds and obtains the policy, Texas law and perhaps the law of other jurisdictions in this circuit, will allow him to recover. This train of events should not be allowed to occur. Public policy must continue to discourage dishonesty in marine insurance applications. Sensible commercial ends of maritime commerce are not served by building into the marine insurance law of this country an incentive for insureds to gamble and cheat, which would only lead to higher insurance costs for all vessel owners, including those who act in the utmost good faith.

CONCLUSION

The conflict among the circuits created by the decision below as to the preeminence of *uberrimae fidei* as a controlling principle of maritime law not only would result in disharmony and lack of uniformity in maritime law, but would also permit and facilitate fraud in the marine insurance industry in the United States. Therefore, Highlands Insurance Company, as Amicus Curiae, respectfully urges this Honorable Court to grant the Petition for Writ of Certiorari.

Dated July 29, 1991.

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CERTIFICATE OF SERVICE

To The Honorable Judges Of This Court:

I, E. D. Vickery, Counsel of Record for Highlands Insurance Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of July, 1991, I served all parties in this matter with three copies of the Brief Amicus Curiae of Highlands Insurance Company, in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by depositing the documents in a United States mailbox, with first-class postage prepaid, addressed to counsel of record at the proper postal address as follows:

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